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Patrick Chau Fook Henn v Public Prosecutor

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COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO S-05–324 OF 2010
RAMLY ALI FCJ, CLEMENT SKINNER AND ABDUL AZIZ ABD RAHIM JJCA
20 MARCH 2013

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Criminal Law — Murder — Defence — Self defence — Deceased attacking appellant with knife during argument — Appellant confessing to stabbing deceased — Apprehension of danger ceased when appellant disarmed deceased and took hold of knife — Appellant not attempting to escape — Appellant inflicting multiple injuries and stab wounds on deceased — Whether appellant exceeding right of self-defence

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Criminal Law — Penal Code — s 302 — Murder — Appeal against conviction and sentence — Deceased found stabbed to death in his car — Appellant confessing to stabbing deceased — Apprehension of danger ceased when appellant disarmed deceased and took hold of knife — Appellant not attempting to escape — Appellant inflicting multiple injuries and stab wounds on deceased — Whether appellant exceeding right of self-defence

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The deceased was found stabbed to death in his car. Several stab wounds were found on the dead body. The pathologist confirmed that one of the stab wounds was the cause of death to the deceased. The appellant who worked for the deceased surrendered himself to the police a few days later. The appellant was charged under s 302 of the Penal Code. The appellant's defence was that he

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was acting in self-defence and that he did not have any intention to cause the injuries. According to the appellant, the deceased had found out that the appellant had misappropriated the company's funds. In order to settle the matter the deceased had driven the appellant in his car to the appellant's house to take the appellant's bank savings account's book. The appellant claimed that

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on the way to the house, the deceased stopped his car and asked the appellant to write and sign a confession statement. When the appellant queried the deceased, the deceased became angry and suddenly took out a knife and attacked the appellant. The appellant testified that everything happened so fast that he could have stabbed the deceased in the struggle. The trial judge held

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that looking at the injuries sustained by the deceased, the appellant had intended to cause the injury which resulted in the death of the deceased. The appellant was convicted and sentenced to death. The appellant appealed against his conviction and sentence. The issues requiring determination in the appeal were: (a) whether the appellant was entitled to a plea of self-defence and;

(b) if the answer to the first issue was positive, had the appellant exceeded his right of self-defence as found by the learned judge.

Held, dismissing the appeal and affirming the conviction and sentence:

(1) The learned judge had correctly addressed the principles applicable to a defence of private self-defence. The burden of establishing a plea of self-defence is on the accused; but the burden is lighter in that the accused need only to discharge the burden on a balance of probabilities. The question that needs to be asked at the end of the day is whether the accused was acting in reasonably necessary self-defence (see para 16).

(2) In assessing whether a private defence had been successfully pleaded by an accused, the court must consider the manner in which force was used by the accused in defending himself from attack. This is because in law the use of force is allowed only when it is absolutely necessary in self-defence (see para 36).

(3) Though the law does not require an accused to run away when he is being attacked, there is an obligation on the part of the accused to make an effort in any reasonable manner to get himself out of danger from the attack. The justification for use of force in retaliation is available only in situations where the accused is cornered and there is no possible way of escaping from the attack except to retaliate by using whatever necessary force that is required for the purpose of self-defence. In the instant case, the deceased had altogether 15 injuries, six of which were stab wounds and one of the stab wound was fatal because it pierced the heart. Beside the stab wounds, the deceased had also sustained four incised wounds (see para 36).

(4) The only inference that could be drawn from the facts was that, in course of the struggle the appellant must have disarmed the deceased and took hold of the knife; with that the appellant retaliated by stabbing the deceased. There was no evidence to show that the appellant was prevented from getting out of the car after he had disarmed the deceased. There was also no evidence by the appellant that he had made an attempt to get out of the car (see para 37).

(5) The appellant had in fact exceeded his right of self-defence because by the time the knife was taken away from the deceased, the apprehension of danger to the appellant ceased (see para 38).

[Bahasa Malaysia summary

Si mati dijumpai ditikam sehingga mati di dalam keretanya. Beberapa luka tikaman didapati pada badan si mati. Ahli patologi mengesahkan bahawa salah satu daripada luka tikaman tersebut adalah penyebab kematian si mati. Perayu yang telah bekerja dengan si mati menyerah diri kepada polis beberapa hari

kemudian. Perayu dituduh di bawah s 302 Kanun Keseksaan. Pembelaan perayu adalah bahawa dia bertindak untuk mempertahankan diri dan bahawa dia tidak mempunyai apa-apa niat untuk menyebabkan kecederaan. Menurut perayu, si mati mendapat tahu bahawa perayu telah menyalahgunakan dana syarikat. Untuk menyelesaikan masalah tersebut, si mati telah memandu perayu dengan keretanya ke rumah perayu untuk mengambil buku akaun simpanan bank perayu. Perayu mendakwa bahawa dalam perjalanan ke rumahnya, si mati memberhentikan keretanya dan meminta perayu menulis dan menandatangani satu penyata pengakuan. Apabila perayu menyoal si mati, si mati menjadi marah dan tiba-tiba mengeluarkan sebilah pisau dan menyerang perayu. Perayu memberi keterangan bahawa semuanya berlaku dengan pantas bahawa dia telah menikam si mati dalam pergelutan tersebut. Hakim bicara memutuskan bahawa melihatkan kepada kecederaan yang dialami oleh si mati, perayu memaksudkan untuk menyebabkan kecederaan tersebut yang mana membawa kepada kematian si mati. Perayu disabitkan dan dijatuhkan hukuman mati. Perayu merayu terhadap sabitan dan hukumannya. Isu-isu yang perlu diputuskan dalam rayuan ini adalah: (a) sama ada perayu berhak ke atas pembelaan mempertahankan diri; (b) dan jika jawapan kepada isu pertama adalah positif, adakah perayu melebihi haknya ke atas pertahanan diri seperti yang diputuskan oleh hakim.

Diputuskan, menolak rayuan dan mengesahkan sabitan:

(1) Hakim telah dengan betul mengarahkan diri beliau pada prinsip-prinsip yang diguna pakai ke atas pembelaan pertahanan diri peribadi. Beban untuk membuktikan akuan pertahanan diri terletak kepada tertuduh; tetapi beban adalah lebih ringan yang mana tertuduh hanya perlu melepaskan beban atas imbangan kebarangkalian. Soalan-soalan yang perlu diajukan di penghujungnya adalah sama ada tertuduh bertindak dalam keperluan pertahanan diri yang munasabah (lihat perenggan 16).

(2) Dalam menilai sama ada pertahanan diri peribadi telah berjaya diplidkan oleh tertuduh, mahkamah mestilah mempertimbangkan cara mana kekerasan dikenakan terhadap tertuduh dalam mempertahankan dirinya daripada serangan tersebut. Ini kerana di bawah undang-undang, penggunaan kekerasan hanya dibenarkan apabila dalam keadaan amat perlu untuk pertahanan diri (lihat perenggan 36).

(3) Walaupun undang-undang tidak memerlukan tertuduh melarikan diri apabila dia diserang, terdapat kewajipan di pihak tertuduh untuk mempunyai usaha dalam cara yang munasabah untuk keluar daripada bahaya serangan tersebut. Justifikasi bagi penggunaan kekerasan sebagai balasan hanya terdapat dalam situasi-situasi di mana perayu telah dikepung dan tiada apa jua cara yang berkemungkinan untuk melepaskan diri daripada serangan kecuali dengan melawan dengan menggunakan apa jua kekerasan yang perlu bagi tujuan pertahanan diri.

Dalam kes ini, si mati mempunyai 15 kecederaan secara keseluruhannya, enam daripadanya adalah luka tikaman dan salah satu daripada membawa maut kerana menembusi jantung. Selain luka-luka tikaman, si mati juga mengalami empat luka takukan (lihat perenggan 36).

(4) Satu-satunya inferens yang boleh dibuat berdasarkan fakta adalah bahawa semasa pergelutan, perayu mungkin telah melucutkan senjata si mati dan mengambil pisau tersebut; dengan mana perayu membalas dengan menikam si mati. Tiada keterangan yang menunjukkan bahawa perayu terhalang daripada keluar daripada kereta tersebut selepas dia melucutkan senjata si mati. Tidak terdapat keterangan oleh perayu bahawa dia cuba untuk keluar daripada kereta tersebut (lihat perenggan 37).

(5) Perayu telah sebenarnya melebihi hak pertahanan dirinya kerana setelah pisau diambil daripada si mati, kebimbangan bahaya kepada perayu telah hilang (lihat perenggan 38).]

Notes

For cases on defence, see 4(1) *Mallal's Digest* (4th Ed, 2012 Reissue) paras 1480–1568.

Cases referred to

Lee Thian Beng v PP [1972] 1 MLJ 248, FC (refd)
Palmer v The Queen [1971] 2 WLR 831, PC (refd)
PP v Ngoi Ming Sean [1982] 1 MLJ 24 (refd)
Soosay v PP [1993] 3 SLR 272, CA (folld)
Ya bin Daud v PP [1997] 4 MLJ 322, HC (distd)

Legislation referred to

Evidence Act 1950 s 105
Penal Code ss 99, 302

Appeal from: Criminal Trial No K45–06 of 2007 (High Court, Kota Kinabalu)

James Tsai (Idrus & Tsai) for the appellant.
Andi Razalijaya bin A Dadi (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Abdul Aziz Abd Rahim JCA (delivering judgment of the court):

[1] The appellant was charged and convicted by the High Court at Kota Kinabalu for an offence punishable under s 302 of the Penal Code. The appellant was sentenced to death by hanging.

[2] This is the appellant's appeal against that conviction and sentenced. We heard the appellant's appeal on 20 March 2013 and at the end of it we dismissed the appeal. We now give our reasons.

THE PROSECUTION'S CASE

[3] At around 6.45pm on 25 September 2006, the deceased was alone at his shop. At 7pm the same day the deceased left the shop and drove off in his white colour land cruiser bearing registration No ST1989A but never returned home. A search for the whereabouts of the deceased carried out by the family members, friends and the deceased's workers failed to locate the deceased.

[4] At 10am on 26 September 2006 the deceased's daughter ('PW9') made a police report that her father was missing.

[5] At about the same time and day that the police report was lodged, the deceased's vehicle was spotted by PW7 who then informed PW8, one of the deceased's children. PW8 went to investigate and confirmed that the vehicle belonged to his father and that the body with blood stains that was found in the vehicle was that of the deceased, his father. He was already dead.

[6] When the police squad arrived at the crime scene, several stab wounds were found on the dead body and later two knives, one of which was without a blade were recovered from the car.

[7] The deceased body was then taken by the police to the hospital where a postmortem was conducted by Dr Jessie ('PW10'), the pathologist. On examining the deceased, PW10 found several stab wounds on the deceased's body and confirmed that one of the stab wounds was the cause of death to the deceased.

[8] The accused who worked for the deceased, surrendered himself to the police on 27 September 2006.

THE ACCUSED'S DEFENCE

[9] The crux of the accused's defence is that he was acting in self- defence and as such he could not have any intention to cause the injuries which in the ordinary course of nature would cause death.

FINDINGS OF THE LEARNED HIGH COURT JUDGE

[10] Reading the judgment of the learned High Court judge, we find that the learned judge had made the following findings:

(a) that the prosecution had established a prima facie case against the appellant and had called upon the appellant to enter his defence on the charge;

(b) that the death of the deceased was caused by the injuries inflicted on the deceased;

(c) that through the evidence of PW10, the pathologist, the death of the deceased was caused by the stab wound to the heart of the deceased and this evidence was never challenged by the defence;

(d) that the appellant inflicted the injuries on the deceased and the court made this finding based on the report of DNA analysis of items found at the crime scene and which DNA report was not challenged by the appellant;

(e) that there is no eye-witness to the stabbing of the deceased. However the circumstantial evidence in this case points to the appellant that shows the appellant had the requisite intention to cause the injury sufficient in the ordinary course of nature to cause death;

(f) that the intention can be inferred from the injuries inflicted on the deceased and the circumstances in which the injuries were inflicted;

(g) that counsel for the appellant had conceded that the injuries inflicted are injuries sufficient in the ordinary course of nature to cause death;

(h) that the pathologist had given evidence that the stab to the heart which caused severe bleeding is an injury which had caused the death of the deceased;

(i) the court was of the view that in a fight between one person and another, there are bound to be defensive injuries as found on the body of the deceased. The evidence of the pathologist is quite clear in stating the deceased had what we call defensive injuries;

(j) the accused said that he acted in self-defence but that evidence cannot be tested against any visual evidence of what happened on that day as there were no eye witnesses to the incident;

(k) the court was in agreement with the DPP's submission that if the accused was in fact acting in self-defence, there is no reason why he did not report to the police immediately and also did not inform the deceased's sons that he did not know the whereabouts of the deceased;

(l) looking at the injuries sustained by the deceased, any reasonable reading of the post mortem would lead to the conclusion that the accused had intended to cause the injury which resulted in the death of the deceased as there were altogether five wounds on the deceased; and

(m) defence counsel has failed to raise a reasonable doubt and therefore the prosecution had proven its case beyond reasonable doubt and the accused is convicted and sentenced to death.

GROUNDS OF APPEAL

[11] Mr James Tsai, the assigned counsel for this appeal had filed a new petition of appeal dated 22 February 2013 to replace the earlier one dated 30 August 2010 filed by the previous solicitor for the appellant. This was done pursuant to the direction given in the letter of appointment of Mr Tsai as counsel for the appellant by the court. We accepted the new petition of appeal.

[12] In the petition of appeal the appellant contends that his conviction is unsafe. This is because he said firstly, the learned judge had arrived at a judgment which is contrary to law, the weight of evidence and the probabilities of the case. Secondly, the judgment was based on surmise and conjecture and therefore does not accord with the principles of law relevant to the circumstances of the case. Thirdly, having found that the deceased in this case was the initial aggressor and that the appellant was faced with an impending peril to life or of great bodily harm either real or so apparent, the learned judge failed to give proper judicial appreciation of the appellant's defence of self-defence when the learned judge held that the appellant had the opportunity to retreat from the attack by opening the door of the car. This is notwithstanding that the appellant himself had suffered a number of wounds which was testified to by PW3 who attended to the appellant at the emergency ward at the hospital who said that the wounds were consistent with injuries sustained in a fight, and were defensive injuries. Fourthly, the learned judge erred in fact and in law in holding that the appellant had exceeded his right of defence on the basis of the age difference between the deceased and the appellant, the letter being younger and stronger. In the circumstances it was the contention of the appellant that the learned judge had erred when he failed to consider at the end of the prosecution case the appellant's defence of private defence and to make the necessary and proper inferences in relation to that defence in the circumstances.

OUR FINDINGS

[13] Two issues require determination in this appeal on the facts and

circumstances of this case as narrated above. The first issue is whether the appellant is entitled to a plea of self-defence and the second issue is that if the answer to the first issue is positive, has the appellant exceeded his right of self-defence as found by the learned judge.

[14] A fact not disputed in this case is that there was no eye witness to the crime committed. The evidence relied on by the learned judge to come to his conclusion on the guilt of the accused is primarily that of PW10 the pathologist who did the post-mortem on the deceased and the evidence by, as well as the conduct of the appellant. The rest of the evidence is circumstantial.

[15] The learned judge in his judgment found that the accused was caught in a situation where he is entitled to the right of self-defence and that the deceased was the initial aggressor. It is also in evidence that the accused admitted to the stabbing of the deceased (which he contended was done in self-defence). However after given the whole evidence his maximum evaluation and judicial consideration the learned judge concluded that the appellant had exceeded his right of self-defence. Is the learned judge correct in his finding?

[16] As to the first issue we find that the learned judge had correctly addressed the principles applicable to a defence of private self-defence by making reference to the statutory provisions in particular s 105 of the Evidence Act 1950 (Act 56) and to case law as explained in a number of English cases as well as Malaysian cases. The learned judge also referred to exposition of these principles by the learned authors of *Ratanlal and Dhirajalal's Law of Crimes* 25th Ed (2002). We can do no better than the learned trial judge to expound these principles. However we will endeavor to summarise and crystalise the principles so that we will be guided by them in considering this appeal. The principles are these: the burden of establishing a plea of self-defence is on the accused (ie the appellant in this case); but the burden is lighter in that the accused need only to discharge the burden on a balance of probabilities. The question that needs to be asked at the end of the day is whether the accused was acting in reasonably necessary self-defence? A defence of self-defence may arise in variety of cases; but everything will depend on the particular facts and circumstances. It was said in *Palmer v The Queen* [1971] 2 WLR 831 that the conception of self-defence is both good law and good sense that a man who is attacked may defend himself. It is not the law that an accused must wait until he receives a grievous injury before he retaliates in self-defence. However the action of retaliation must not be wholly out of proportion to the necessities of the situation. The accused may justify an immediate defensive action if he is in immediate peril or if he is in imminent danger he may avert the danger by some instant action.

[17] In this instant appeal the facts show that the appellant had worked for

the deceased as an administrator and accounts clerk at the deceased's office. The appellant testified that sometime on 21 September 2006, the deceased told him there were discrepancies in the company's accounts. The accused admitted under cross-examination by the learned deputy public prosecutor that he had misappropriated the company's funds during his employment with the deceased for his own use. The appellant also explained in cross examination the mechanics of how he misappropriated the company's funds. The appellant further testified that the deceased suggested to him that the matter (as to the misappropriation) could be settled between the two of them without telling other people. The appellant agreed with the suggestion and signed a statement which was shown to him by the deceased but no amount was stated in the statement. However the deceased was not satisfied. On 23 September 2006 the deceased once again came to the office to see the appellant. This time, the deceased brought a hard cover log book and asked the appellant to write a statement in it which was dictated to the appellant by the deceased. The appellant was asked to sign the statement that he had written in the log book as dictated by the deceased and he was also asked to write his full name and identity card number. The statement written by the appellant can be seen at p 6 of exh P17. It was evident from the testimony of the appellant that the statement that he had made as dictated to him by the deceased is a confession that the appellant had misappropriated about RM68,303.46 of the company's funds, a figure which was disputed by the appellant. However the appellant said he still signed the statement as he did not want the matter to be known to anybody and that the deceased had threatened to report the matter to the police.

[18] The appellant testified that on 25 September 2006 the deceased had asked him to sign another statement which also appears to be a confession and had also requested the appellant to show his saving bank account's book which the appellant informed the deceased was kept at his house. Thereafter the appellant said, the deceased insisted that the appellant go to the house in the deceased's car to take the saving bank account's book.

[19] The appellant testified that on the way to his house, the deceased stopped his car at the Sri Kepayan shop lots and asked the appellant to write and sign another statement. The appellant testified that the surrounding area was dark and the deceased had to switch on his torch light so that the appellant could write. The appellant further testified that when he queried the deceased as to why he had to write at that place when they were going to his house where he could write there, the deceased became mad and angry and the deceased suddenly took out an object like a knife and threatened to hurt the appellant and to kill him. At that point of time the appellant said the deceased attacked

him. The appellant testified that everything happened so fast that he could have stabbed the deceased in the struggle. The appellant said at that time he was fearful for his life.

[20] From the testimony of the appellant one undisputed fact that emerged is that there was a struggle in the deceased's car between the appellant and the deceased with the appellant allegedly trying to ward off the attack by the deceased. But what actually happened was not that clear because there was no eye witness and it happened so fast that the appellant could not really describe the details. The appellant testified that he got out of the deceased's car after the deceased became unconscious. He also took the keys to the deceased's car so that according to him the deceased would not be able to follow him. The appellant said he then walked home from the scene of the incident.

[21] The testimony of the appellant and the facts that emerged from it were given a proper judicial appreciation by the learned judge when he concluded that:

> Having heard the evidence I have no doubt that the accused was caught in a situation where he was entitled to his right of self defence from harm by the deceased.

[22] This is a finding of fact by the learned judge; and in our view in the circumstances of the case he was justified in his finding.

[23] However, having said so, the learned judge went on to consider the law that is stated in s 99 of the Penal Code which read as follows:

> The right of private defence in no case extends to the inflicting of more harm than it is necessary to inflict of the purpose of defense.

[24] The learned judge then referred to four critical justifications stated in *Ratanlal and Dhirajlal's Law of Crimes* (25th Ed) which must be met before the plea of self-defence can succeed. The four critical justifications are:

(a) the accused must be free from fault in bringing about the encounter;

(b) there must be present an impending peril to life or of great bodily harm either real or so apparent;

(c) there must be no safe or reasonable mode of escape by retreat; and

(d) there must have been necessity of taking life.

[25] This, brings us to the second issue that is whether the appellant had exceeded his right of self-defence. On the aforementioned facts as testified by

the appellant, the learned judge found that justification (a) and (b) were met. However, as to justification (c) and (d) the learned judge proceeded to examine the circumstances in which the struggle between the appellant and the deceased took place and the injuries sustained by the deceased as well as the appellant.

[26] As to the injuries sustained from the appellant, there is the evidence of PW3 the medical officer at the Emergency Department of Queen Elizabeth Hospital Kota Kinabalu, Sabah who testified that he examined the appellant when the appellant was brought in by the police. PW3 put up a report of the result of the examination as in exh P3. The report ('P3') shows that the appellant suffered minor wounds on left arm and left thigh which according to PW3 could well be defensive injuries.

[27] As for the injuries suffered by the deceased, the learned judge found that the deceased had sustained both defensive and offensive injuries. The evidence of this came from the pathologist Dr Jessie Hiu ('PW10'). According to PW10, the deceased suffered injuries on the face, abdomen, upper limbs and lower limbs. These injuries were described in her post-mortem examination report dated 3 October 2006 which was tendered as exh P6. In the report the injuries were described as follows:

Injuries

Face

(a) Bruise with superficial mucosal lacerations over an area of about 2 x 2 cm involving the lower lip.

Abdomen

(b) A stab wound about 4.1 x 1 cm (4.3 cm long when the wound was closed) orientated transversely on the upper mid-front of the abdomen about 118 cm above the heel. Both ends of the wound were sharply cut. It was directed backward cutting the diaphragm, the pericardium, the anterior and the posterior walls of the right ventricle of the heart. The estimated depth was 16 cm.

(c) A stab wound about 1.8 x 0.3cm (2.2. cm long when the wound was closed) orientated obliquely on the upper mid-front of the abdomen below injury No. 2 about 117 cm above the heel. The upper margin was abraded. Both the ends of the wound were sharply cut. It was directed obliquely downward along the abdominal wall cutting fat tissue.

(d) A stab wound about 6.5 x 2 cm (7.2 cm long when the wound was closed) orientated obliquely on the front of the abdomen about 3 cm to the right of midline and about 112 cm above the heel. The upper margin was abraded. The lower end of the wound was sharply cut and the upper end was blunt. It was directed obliquely downward and to the right cutting fat tissue and the peritoneum.

(e) A stab wound about 3.2 x 1 cm (4 cm long when the wound was closed) orientated transversely on the lower mid-front of the abdomen about 107 cm above the heel. The upper margin was abraded. The left end of the wound was blunt and the right end continued as an oblique linear abrasion about 4 cm long. There was minimal soft tissue haemorrhage. It was directed obliquely to the left along the abdominal wall cutting fat tissue.

(f) A stab wound about 1.5 x 0.3 cm (1.6 cm long when the wound was closed) orientated obliquely on the left front of the abdomen about 8 cm to the left of midline and about 110 cm above the heel. The upper margin was abraded. The lower end of the wound was sharply cut and the upper end was blunt. It was directed obliquely downward and to the right along abdominal wall cutting fat tissue.

Upper limbs

(g) A stab wound about 4 x 1 cm (4.5 cm long when the wound was closed) orientated vertically on the mid-front of the right arm about 21 cm below the shoulder joint. There was bruise along the medial margin. Both ends of the wound were sharply cut.

(h) An abrasion about 0.5 cm in diameter on the upper aspect of the right thumb.

(i) A superficial incised wound about 5 cm long orientated obliquely on the lower back of the left forearm about 9 cm above the wrist joint and about 18 cm below the elbow joint. There was minimal soft tissue haemorrhage.

(j) An incised wound about 0.7 cm orientated transversely on the lower back of the left forearm about 1 cm above the wrist joint.

(k) An incised wound about 10 cm long orientated obliquely on the back of the left thumb.

(l) An incised wound about 0.5 cm long orientated transversely on the proximal part of the front of the left ring finger.

(m) An incised wound about 3 cm long orientated obliquely on the inner proximal part of the left ring finger.

(n) An incised wound about 1.5 cm long orientated obliquely on the inner distal part of the left fifth finger.

Lower limb

(o) A bruise about 4 cm in diameter on the inner aspect of the left knee.

[28] PW10 in her report concluded that the injuries on the upper limb of the deceased were consistent with defensive injuries and the cause of death is the stab wound on the upper mid-front of the deceased's abdomen (which is described as injury No 2 in the pathologist's report P3) which penetrated the heart of the deceased that resulted in massive haemorrhage. PW10 also concluded that the injuries described in her report are consistent with that caused sharp object or weapon.

[29] In analysing the injuries found on the appellant and the deceased, the learned judge concluded as follows:

(a) the significance of the defensive injuries of deceased is that at some stage of the attack the deceased was on the defensive though in my mind he was the initial aggressor;

(b) the appellant's injuries which needed only out-patient treatment shows that the appellant had the opportunity to retreat from the attack by opening the door of the car if he had wanted to; and

(c) looking at the totality of the injuries of both the deceased and the appellant, the appellant had at some stage of the struggle with the deceased, overcome the deceased and inflicted those stab wounds on the deceased.

As regard to para (c) above, the learned judge formed his view on the fact that the deceased was 64 years old compared to the appellant which was at that time 36 years old. In the view of the learned judge, the age difference is significant because it shows that the appellant is stronger and more agile in defending himself against the deceased's initial attack.

[30] In this regard, learned counsel for the appellant submitted before us that the learned judge had erred when he put too much emphasis on the difference of age and physical make-up between the deceased and the appellant. Learned counsel submitted as follows:

> In this respect and in our instant case, the learned trial judge failed to grasps that the right of private defence has no dependency on the fragilities of the deceased; be it being older or less agile than the accused … To the extent the learned trial judge had ruled that the appellant has exceed his right of private defence just because of his more physical quality, instead of whether there is a reasonable apprehension of any danger to his life, we humbly submit that it is a total misdirection.

[31] Citing a passage from *Gour's Penal Law of India* at pp 814–815, which read as follows:

> … the central point which must be borne in mind is, that the right of private defence continues only so long as a reasonable apprehension of the danger persists. When a number of injuries come to be inflicted by an accused person in the exercise of the right of private defence, the important point which has to be determined is as to whether in the circumstances in which the accused person was placed, the apprehension had persisted in his mind when he inflicted a particular injury or injuries that his life was in danger and whether, under the circumstances in which he was placed, that apprehension was a reasonable one.

Learned counsel for the appellant submitted that though the learned judge had

recognised that the appellant has the right of private defense, the learned judge had failed to consider all the relevant factors and the width of this right as found on the facts of the present case.

[32] As to the learned judge's finding that the appellant had had the opportunity to escape from the attack by the deceased by opening the door of the car and moved away from the deceased, learned counsel for the appellant submitted that in law there is no specific requirement to do so. He further submitted that there is not an iota of evidence that the appellant was at any time out of danger during the incident in the deceased's car; or had the chance to escape from the car. He also submitted that since there is no eye-witness to the whole event, any finding that the appellant was out of danger, or was able to escape or retreat, is only a conjecture or surmising of the possibilities.

[33] To support his submission, learned counsel for the appellant cited the case of *Ya bin Daud v Public Prosecutor* [1997] 4 MLJ 322. In that case the accused was on his way home when he was confronted by the deceased and another who were both armed. The accused rushed home and armed himself with a 'golok' to fend off his attackers. In the ensuing fight between the accused and the deceased, the deceased was fatally wounded on his head and died at the scene. The accused surrendered himself to the police. He was then charged and convicted and sentenced by the sessions court on the charge of culpable homicide not amounting to murder. On appeal to the High Court at Kota Bharu on conviction and sentence the accused was acquitted. In that case, the High Court found that the accused could avail himself to the right of private defence and it was immaterial that the accused was the source of his own attack by virtue of the harm inflicted on the brother of the deceased; and nor was it material the accused was a 'silat' instructor and younger than both his attackers.

[34] However, after a careful reading of the facts of the case in *Ya bin Daud*, the case can clearly be distinguished from the present appeal. In that case (at p 328 of the report) the trial judge made the following finding:

> Together they attacked the appellant, and the appellant being alone and cornered in his own compound and coupled with the crying of his wife, I find that at that point of time, the appellant had more than a reasonable apprehension of death or grievous hurt at the hands of the deceased and SP10. He need not wait till he receives a grievous injury before he can exercise his right of private defence. There was no way out for the appellant to escape as he was surrounded by SP10, the deceased and SP8. He was entitled to defend himself the best way he could.

[35] With regard to the injuries sustained by the deceased, learned DPP submitted before us that during the trial, the appellant was evasive when asked how the stab wounds on the deceased were inflicted. The appellant's main answer was that, he cannot remember because it was dark and everything

happened so fast. Learned DPP also submitted that it is highly improbable that the appellant cannot remember at all how the deceased got injured. The injuries on the deceased were multiple, of which were six stab wounds on his front side of the body. Though one would not expect the appellant to modulate his defence step by step, nevertheless a blanket denial of not knowing how it happened it was submitted, unreasonable. For the injuries to be inflicted on the deceased, the appellant must have gotten control of the weapon. With the weapon in hand, he undoubtedly had the upper hand of the situation. He could have run out of the car and bolted away or take necessary step to curb the deceased's assault (if any) without causing such severe injuries. The appellant's contention that the stab wounds were caused accidentally when they grappled for the weapon was improbable. It cannot be that the six stab wounds were caused by accident. One is probable but six are totally out of the question. Furthermore, it was never put to the pathologist that this was the case.

[36] In *Public Prosecutor v Ngoi Ming Sean* [1982] 1 MLJ 24, it was said that the right of private defence commences as soon as there is apprehension of danger to the body and this right continues so long as such apprehension of dangers continues. And, it goes without saying that the right of private defence ceases and is not available when there is no more apprehension of danger to the body. In assessing whether a private defence had been successfully pleaded by an accused, the court must consider the manner in which force was used by the accused in defending himself from attack. This is because in law the use of force is allowed only when it is absolutely necessary in self-defence: See *Lee Thian Beng v Public Prosecutor* [1972] 1 MLJ 248, where the court had said that '... it is clearly the law, with regard to the use of force in self-defence, that there must be no alternative to its recourse.' It is also in our view that though the law does not require an accused to run away when he is being attacked, there is an obligation on the part of the accused to make an effort in any reasonable manner to get himself out of danger from the attack. The justification for use of force in retaliation is available in our view only in situations where the accused was cornered and there is no possible way of escaping from the attack except to retaliate by using whatever necessary force that is required for the purpose of self-defence. In this instant case, that is on appeal before us, the fact shows that the deceased has altogether 15 injuries, six of which are stab wounds and one of the stab wound is fatal because it pierced the heart of the deceased and caused massive haemorrhage resulting in death. Beside the stab wounds, the deceased had also sustained four incised wounds.

[37] The appellant had testified that while he was in the car with the deceased and when he questioned the deceased as to why he should make and sign the statement there and then without first going to his house, the deceased got angry and took out a knife. Then there was a struggle between them in the car. The question is, how did the deceased sustain the stab wounds? There is no

evidence to suggest that the appellant was armed with any sharp object like a knife. The only inference that can be drawn from the facts of this case is that, in course of the struggle the appellant must have, as submitted by the learned public prosecutor, disarmed the deceased and took hold of the knife; with that the appellant retaliated by stabbing the deceased. There is also no evidence in this case to show that the appellant was prevented from getting out of the car after he had disarmed the deceased. There is also no evidence by the appellant that he had made an attempt to get out of the car by opening the door of the car next to the front passenger seat where he was sitted. Taking these facts into consideration and the wounds or injuries that were inflicted on the deceased, we are of the view that the learned judge was correct in his conclusion that the appellant had exceeded his right of self-defence.

[38] In this regard, we agree with learned deputy public prosecutor in citing the case of *Soosay v Public Prosecutor* [1993] 3 SLR 272, to show that the appellant had in fact exceeded his right of self-defence because by the time the knife was taken away from the deceased, the apprehension of danger to the appellant ceased. In *Soosay*, the court was dealing with private defence of the accused person who had been attacked by the deceased. In the process of the attack the accused managed to dislodge the knife from the deceased's hand. The court stated that:

> Certainly, when Soosay and Kuppiah were confronted with the knife Lim had drawn from his handbag and pointed it threateningly at Kuppiah, the right of private defence had arisen. Soosay was perfectly justified in kicking at Lim. This was an act in the defence of Kuppiah and himself. The result was that Lim fell to the ground and the knife was dislodged from his hand. Lim had been disarmed and Soosay took possession of the knife. The difficult question we have to answer is whether in using that knife, whether such use was active (example injuries (i) and (iii)) or passive (example injury (ii) when Lim rushed at Soosay), Soosay must have had a reasonable apprehension of danger to his life. This is the very question the learned trial judge asked himself which he answered in the negative. The test is obviously an objective one. On an objective inquiry into the facts it cannot be said that Soosay, who now had possession of the knife and probably had the knowledge that his friend Kuppiah was still at the scene, could have conceived of any danger to his life.

[39] In our view, though the facts in *Soosay*'s case are not on all fours with the facts in this instant appeal, the similarity of fact that the appellant after a brief struggle with the deceased was apparently in possession of the weapon which likely to be the knife found by the police at the scene of the incident shows that by the time the appellant in this case got hold of the knife, it cannot be said that the appellant was in any danger to his life and in our view from that moment on, the reasonable apprehension of danger or an imminent threat to the appellant's life ceased.

[40] For the reasons given above, we are of the view that the findings and conclusion of the learned trial judge in this case do not warrants an appellate intervention. Accordingly, this appeal by the appellant is dismissed and the conviction and sentence by the High Court at Kota Kinabalu is affirmed.

Appeal dismissed and conviction and sentence affirmed.

Reported by Kanesh Sundrum